

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE ESTATE OF MARGARETTE F. EBY
By its Personal Representative,
DAYLE TRENTADUE,

Plaintiff/Appellee,

Supreme Court No. 128579, 128623,
128624, 128625
Court of Appeals No. 252155, 252207,
252209

vs.

Genesee Circuit Case No. 02-74145-NZ

BUCKLER AUTOMATIC LAWN SPRINKLER
COMPANY, SHIRLEY GORTON, LAURENCE
W. GORTON,

Defendants/Appellants,

and

JEFFREY GORTON, VICTOR NEIBERG,
TODD MICHAEL BAKOS, MFO MANAGEMENT
COMPANY and the ESTATE OF RUTH R. MOTT,

Defendants.

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DEFENDANTS/APPELLANTS BUCKLER/GORTON'S REPLY BRIEF

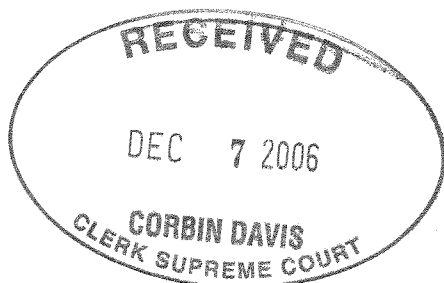


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STATEMENT OF QUESTIONS INVOLVED

I. SHOULD PLAINTIFF'S LATE-FILED CLAIM BE ALLOWED TO SURVIVE BY APPLICATION OF THE DOCTRINE OF EQUITABLE "JUDICIAL TOLLING"?

TRIAL COURT ANSWERED - DID NOT ADDRESS

COURT OF APPEALS ANSWERED - DID NOT ADDRESS

PLAINTIFF/APPELLEE ANSWERS - YES

DEFENDANTS/APPELLANTS ANSWER - NO

II. DOES APPLYING SECTION 5827 AS ENACTED BY THE LEGISLATURE, WITHOUT GRAFTING TO IT THE JUDICIALLY PROMULGATED COMMON LAW DISCOVERY RULE UNCONSTITUTIONALLY DENY PLAINTIFF OF DUE PROCESS?

TRIAL COURT ANSWERED - DID NOT ADDRESS

COURT OF APPEALS ANSWERED - DID NOT ADDRESS

PLAINTIFF/APPELLEE ANSWERS - YES

DEFENDANTS/APPELLANTS ANSWER - NO

III. IF THIS COURT OVERRULES THE COMMON LAW DISCOVERY RULE, SHOULD SUCH HOLDING BE APPLIED RETROACTIVELY OR PROSPECTIVELY?

TRIAL COURT ANSWERED - DID NOT APPLY

COURT OF APPEALS ANSWERED - DID NOT APPLY

PLAINTIFF/APPELLEE ANSWER - PROSPECTIVELY

DEFENDANTS/APPELLANTS ANSWER - RETROACTIVELY

INTRODUCTION

As pointed out by counsel for MFO Management in its motion to strike Appellee's counter-statement of facts etc., the "facts" recited in Plaintiff/Appellee's brief are not, for the most part, facts contained within the record of this case nor relevant to this appeal. The only record facts relevant to the instant appeal are that almost 16 years elapsed between the time of Mrs. Eby's murder and the time of the filing of this lawsuit. The sole reason for this extended hiatus was Plaintiff/Appellee's failure/inability to identify Mrs. Eby's murderer. No other facts are relevant nor contained within the record on appeal.

It is apparent that Plaintiff/Appellee has "supplemented" the record for the purpose of appealing to the emotions of the members of this Court. Frankly, one cannot help but be moved by the tragedy. However, the rule of law which is to be considered by this Court is/will be applicable to all cases which attempt to assert the common law discovery rule where a cause of action would otherwise be barred by the accrual statute, MCL 600.5827. The same issue would be presented, for instance, if Mrs. Eby's death had resulted from a hit-and-run motor vehicle accident in which the driver of the hit-and-run vehicle was not identified for 15 years which, in turn, allowed identification of the owner of the vehicle (for purposes of liability under the Owners Civil Liability Act, MCL 257.401) and the potential liability of a dram shop who made an illegal sale to the hit-and-run driver/AIP (for purposes of liability under the Dram Shop Act, MCL 436.1801, et seq). Similarly, Mrs. Eby's death could have resulted from the failure of a product, the cause of the failure being detected/identified 15 years after the death as a result of new technology having been developed, allowing the identification of the manufacturer of the faulty subcomponent which resulted in the product failure.

The "facts" contained within Plaintiff/Appellee's brief, while sensational, are not

contained within the record on appeal nor relevant to the issues to be decided on appeal.

I. SHOULD PLAINTIFF'S LATE-FILED CLAIM BE ALLOWED TO SURVIVE BY APPLICATION OF THE DOCTRINE OF EQUITABLE "JUDICIAL TOLLING"?

In the initial portion of her brief, Plaintiff/Appellee seeks not to discuss the issue raised by Defendants/Appellants in their application for leave to appeal, nor the issues which this Court directed be addressed in its Order granting those applications. Instead, and for the first time in the lengthy history of this case, Plaintiff/Appellee argues that MCL 600.5827 has no application in this case which is, rather, governed by MCL 600.5805. This "change the ground rules" approach of Plaintiff/Appellee can offer her no respite for a number of reasons.

First of all, it is doubtful that in enacting Section 5805(10) the Legislature chose to incorporate a combined statute of limitations and accrual provision in the midst of multiple sections of the Revised Judicature Act which, Plaintiff/Appellee concedes, deals solely with statutes of limitation. Likewise, the Revised Judicature Act having been a comprehensive overhaul of civil procedure within the State of Michigan, it is unlikely that the Legislature chose to remove one accrual provision from all of the other accrual provisions and bury it within the statute of limitations provisions.

Secondly, and more importantly, the doctrine of equitable/judicial tolling is no more applicable to the instant case in reference to Section 5805(10) than is application of the common law discovery rule to accrual of Plaintiff/Appellee's action under Section 5827. Plaintiff/Appellee's lawsuit, under either theory, was not timely filed.

By arguing that accrual of Plaintiff/Appellee's cause of action is controlled by

Section 5805(10), Plaintiff concedes that the cause of action accrued at the time of Mrs. Eby's death, i.e. not later than November 9, 1986. That being so, to be timely Plaintiff/Appellee's suit had to be filed not later than November 9, 1994. MCL 600.5805(10), MCL 600.5852. However, Plaintiff/Appellee would have this Court apply "judicial tolling" to the "compelling circumstances" presented by the "facts" of this case. In support of such a request, Plaintiff/Appellee cites to this Court's recent opinions in Bryant v Oakpointe Villa Nursing Centre Inc, 471 Mich 411; 684 NW2d 864 (2004) and DeVillers v Auto Club Insurance Ass'n, 473 Mich 562; 702 NW2d 539 (2005). Neither of those cases, however, supports application of judicial tolling to the instant case.

In Bryant, this Court invoked equitable "judicial tolling" because of the perceived confusion in the status of the law at the time that case was filed:

"The equities of this case, however, compel a different result. The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*. Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." Bryant, supra, at 432 (emphasis added)

Subsequently, in DeVillers, supra, this Court acknowledged its inherent equitable power to apply the doctrine of judicial tolling, but indicated that it would do so only on an extremely limited basis:

"Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake." Id at 590

In dissent, Justice Cavanagh made reference to the Court's application of judicial tolling in Bryant, supra. In response, Justice Young, speaking for the majority, distinguished Bryant from DeVillers, and explained the "unusual circumstances" that were present in

Bryant which were not present in DeVillers:

"fn65. Justice Cavanagh asserts that because we granted equitable relief in *Bryant v Oakpointe Villa Nursing Ctr Inc* 471 Mich 411, 432; 684 NW2d 864 (2004), there is no reason not to apply in this case. This argument illustrates the fundamental disagreement between a majority of this Court and Justice Cavanagh, as well as the *Lewis* Court, concerning the proper application of equitable relief.

In *Bryant*, our grant of equitable relief was a pinpoint application of equity based on the particular circumstances surrounding the plaintiff's claim; namely, the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate. Accordingly, our limited application of equity in *Bryant* was entirely consistent with the 'unusual circumstances' standard for equitable relief discussed above. In *Lewis*, however, the Court chose to adopt an a priori rule of equity without regard to the particular circumstances of litigants in a given case. In granting blanket equity to an entire *class* of cases, therefore, the *Lewis* Court essentially rewrote §3145(1). Such a categorical redrafting of a statute in the name of equity violates fundamental principles of equitable relief and is a gross departure from the proper exercise of the 'judicial power.' Const 1963, art 3, §2 and art 6, §1. Accordingly, Justice Cavanagh's unmitigated praise for the *Lewis* Court's holding is, in our view, quite misplaced.

Moreover, we note that, in *Bryant*, there was no controlling statute negating the application of equity. Instead, the disputed issue in *Bryant* - whether a claim sounds in medical malpractice or ordinary negligence - was controlled by this Court's case law. On the other hand, in the present case, there is a statute that controls the recovery of PIP benefits: § 3145(1). Section 3145(1) specifically states that a claimant 'may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced,' and this Court lacks authority to say otherwise." (emphasis added)

This is consistent with this Court's prior decision in *Secura Insurance Co v AutoOwners Insurance Co*, 461 Mich 382; 605 NW2d 308 (2002). There, despite a seeming conflict in prior appellate decisions, this Court found it inappropriate to apply judicial tolling in the face of a specific statute:

"It is a fundamental principal of statutory construction that, 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.' [citation omitted] This is a case where the statute speaks for itself, and there is no need for judicial construction. The Legislature has decreed that property damage claims must be brought within one year of the accident. There is no hint in the language of subsection 2 that the Legislature intended that there be any tolling of that time." Id at 387.

The rule to be gleaned from Bryant, DeVillers and Secura is that, before this Court will apply judicial tolling, there must not only be the "unusual circumstances" of fraud, mutual mistake or "preexisting jumble of case law", but the statute seeking to be tolled must give evidence, from its language, that the Legislature intended to allow tolling.

This rule was confirmed within the past month by our Court of Appeals, sitting in special panel. In Ward v Siano, _____ Mich App _____ (2006), the special panel held:

"In our previous opinion in this case, this Court agreed that retroactive application of *Waltz* could not coexist with application of the doctrine of equitable tolling founded on the basis that it was unfair to apply *Waltz* retroactively. We concur with that reasoning. . Equitable or judicial tolling ordinarily applies to a specific extraordinary situation in which it would be unfair to allow a statue of limitations defense to prevail because of the defendant's bad faith or other particular and unusual inequities. [citation omitted] Absent statutory language allowing it, judicial tolling is generally unavailable to remedy a plaintiff's failure to comply with express statutory time requirements [citation omitted]. Inequities that justify judicial tolling must arise independently of the plaintiff's failure to diligently pursue the claim in accordance with the statute.

* * *

In light of *Waltz*, any attempt on our part to excuse nonconformity with the statute would amount to amending the statute - in effect, legislating from the bench. [citation omitted] This is not the function of the judiciary." (emphasis added)

While the Ward panel did not indicate what "inequities" would justify application of judicial tolling, the policy underlying statutes of limitations, i.e. relieving defendants of

the burden of litigating stale claims, dictates that these inequities not be the individual facts of a particular case.

Plaintiff/Appellee, of course, advances the position that Sections 5827 and/or 5805(10) do express a Legislative intent to allow application of the discovery rule and/or judicial tolling because other provisions, specifically Sections 5838 and 5838(a) specifically negate the application of delayed accrual via the discovery rule, or application of judicial tolling, for those sections. Again, Plaintiff/Appellee's position fails for two reasons.

First of all, this Court has, on numerous occasions, rejected the doctrine of Legislative silence. See *Amicus Brief* Mich. Electric Gas Assoc, pp 5-6. More importantly, other provisions of the accrual statutes which follow Section 5827 specifically provide their own discovery rule:

"In actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of warranty is discovered or reasonably should be discovered."
MCL 600.5833

Section 5833 was enacted at the same time as Section 5827 and Section 5805(10). If, as suggested by Plaintiff/Appellee, the Michigan Legislature was cognizant of the common-law discovery rule and the effect it had on limitations periods when they enacted Sections 5838 and 5838(a), why, one is forced to ask, did that Legislature feel the need to specifically include a statutory discovery rule into Section 5833? In short, the argument Plaintiff/Appellee makes based upon Sections 5838 and 5838(a) is negated, by the Legislature, by its enactment of Section 5833.

In the present case, none of the "Bryant-DeVillers-Secura" criteria allowing application of equity are met. Nothing within Section 8505(10) evidences a Legislative intent to allow tolling. Moreover, Plaintiff/Appellee does not assert any confusion based

upon a "preexisting jumble of case law", fraud or mutual mistake, but rather a simple absence of facts upon which she could base her complaint. Certainly, the "pinpoint application of equity" referenced by this Court in DeVillers does not apply to the individual factual support for a party's claim. To do so would render any statute of limitations meaningless and subject to the whim/equity of a court. Without fraud, mutual mistake or confusion of law, but rather only an absence of factual support for a claim, it would be inappropriate to apply judicial tolling to the instant case.

II. DOES APPLYING SECTION 5827 AS ENACTED BY THE LEGISLATURE, WITHOUT GRAFTING TO IT THE JUDICIALLY PROMULGATED COMMON LAW DISCOVERY RULE UNCONSTITUTIONALLY DENY PLAINTIFF OF DUE PROCESS?

Plaintiff/Appellee does not dispute that the statute of limitations, Section 5805(10) grants her three years within which to file a cause of action. In fact, the Legislature has extended that statute of limitations to up to six years because of the death of Mrs. Eby. MCL 600.5852.

Plaintiff/Appellee does not suggest, nor could she suggest, that six years is not a reasonable time within which to file a wrongful death claim. Moreover, Plaintiff/Appellee does not suggest that, within the six year period, she did not know of the existence of a possible cause of action stemming from Mrs. Eby's death. She argues, only, that she did not know against whom that cause of action lay. Of course, as pointed out in the initial brief of Defendants/Appellants Buckler, the discovery rule has never been applied to delay accrual of a cause of action when the identity of the tortfeasor is unknown.

Plaintiff/Appellee does suggest that applying Section 5827 as written, without grafting to it the judicially created common law discovery rule, renders it unconstitutional as a denial of Plaintiff/Appellee's due process.

It cannot be doubted that the State has a legitimate interest in providing for when civil causes of action accrue and when they become stale. Accordingly, to survive a constitutional challenge on due process grounds, the statute must satisfy a rational basis analysis. Phillips v Mirac Inc, 470 Mich 415; 685 NW2d 174 (2004). In undertaking this analysis, the Court must construe every reasonable presumption in favor of the challenged statute. Id at 423. Finally, because both accrual statutes and statutes of limitations are procedural rather than substantive, they will be upheld unless a party can show that they are so harsh and unreasonable as to violate the party's right to "the access to the courts intended by the grant of the substantive right." Gleason v Dept of Transportation, 256 Mich App 1; 662 NW2d 822 (2003) quoting Forest v Parmalee, 402 Mich 348, 359; 262 NW2d 653 (1978)

As pointed out previously, Plaintiff/Appellee knew that a cause of action under the Michigan Wrongful Death Act, MCL 600.2922, existed when Mrs. Eby was found murdered on November 9, 1986. Plaintiff/Appellee was given six years within which to discover the identity of the murderer, as well as those who may have been collaterally responsible, and commence suit. That she could not identify the murderer within that period of time did not deny her ". . .the access to the courts intended by the grant of the substantive right" afforded her under the Wrongful Death Act. She simply failed to make the required identification of the murderer within the time allowed her.

This Court has rejected such a due process challenge in the context of a combined statute of limitations/statute of repose. O'Brien v Hazelet & Erdal, 410 Mich 1 (1980). Similarly, in Lumber Village Inc v Siegler, 135 Mich App 685 (1984), after reviewing both federal and foreign state decisions, the Court of Appeals likewise rejected Plaintiff/Appellee's argument:

"Since a review of relevant federal and state law discloses that neither the federal nor state constitution mandates that a 'discovery' rule be utilized when applying a statutory period of limitation, we find Issue I to be without merit."

In order to pass constitutional muster, Section 5827 need not afford every plaintiff an opportunity to discover and file their claim. This statute simply must not deny them of the right of access to the court. Having been given six years, Plaintiff/Appellee cannot say she was denied that right of access.

III. IF THIS COURT OVERRULES THE COMMON LAW DISCOVERY RULE, SHOULD SUCH HOLDING BE APPLIED RETROACTIVELY OR PROSPECTIVELY?

If the Court determines that the common law discovery rule is to be abolished as contrary to the plain language of Section 5827, Plaintiff/Appellee urges the Court's ruling to be prospective only, not even applying to the instant action. In support of their position, they rely upon the "time honored" doctrine of *stare decisis*. In response, I would like to quote Judge Thomas B. North of the Mackinac County Probate Court in his Letter to the Editor of Michigan Lawyers Weekly, published November 20, 2006:

"After following with interest the ongoing letters back and forth regarding conflicting legal philosophies in the State, I must write in support of Mr. Timothy Baughman's comments.

. .

Next to the letter was another, boldly pronouncing that 'It is beyond argument that the doctrine of *stare decisis* is the cornerstone of our jurisprudence. . .' Apparently just because the writer says so. . .

Well, his statement does not go beyond or preclude my argument to the contrary. And, my argument, without getting drawn into all the other controversies, is that the doctrine of *stare decisis* is logical, and does help attorneys advise clients. But no doctrine, nor any line of judicial interpretations in the case law, even if part of a history and a pattern for many jurists, can replace the U.S. Constitution itself, as the only true cornerstone of our jurisprudence.

The State Constitution, statutes legislatively enacted, case law, and common law, and all other laws fill in the myriad of necessary substantive and procedural laws, and 'details', and deserve deference, but the case law itself will never be the cornerstone. . .

Some conservative counter-judicial activism may be necessary as a corrective action, even if it leads temporarily to less predictability for attorneys and clients.

To say that case law at odds with the Constitution and/or statutes should be perpetuated just to lend predictability to attorneys and clients would result in the ultimate form of 'results oriented' jurisprudence. . .

For those reasons, while all the letters may have some merit, in the end, Mr. Baughman's analysis comports with established law rather than a doctrine." 21 Mich.L.W. 4 (emphasis added)

If this Court determines that the common law discovery rule is incompatible with the legislatively enacted accrual statute, MCL 600.5827, this Court should right the wrong of prior courts and apply such a ruling retroactively.

SUMMARY

This Court should overrule the common law "discovery rule", holding that it circumvents the plain language of MCL 600.5827, and give such ruling full retroactive effect. At a bare minimum, this Court should find that the courts below erred in applying the common law discovery rule in a "failure to identify the tortfeasor" case such as this.

Respectively submitted,

GAULT DAVISON, P.C.

Dated: 12-7-06



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